THE NEW-YORK
CITY-HALL RECORDER.

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AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 6th day of *September*, in the year of our Lord one thousand eight hundred and nineteen—

PRESENT,

The Honourable
CADWALLADER D. COLDEN, *Mayor.*
ASA MANN, and GEORGE B. THORP, } *Aldermen.*
P. C. VAN WYCK, *Dist. Att.*
JOHN W. WYMAN, *Clerk.*

(GRAND LARCENY—RESTITUTION OF STOLEN PROPERTY.)

ALEXANDER BALL'S CASE.

VAN WYCK, and RODMAN, *Counsel for the prosecution.*
HAWKINS, *Counsel for the prisoner.*

B. was convicted on an indictment for grand larceny, in stealing one guinea of the value of $4 75, thirty doubloons of the value of $15 each, and four hundred and forty-four Spanish dollars. On the trial it appeared, that there were found in possession of the prisoner one hundred and thirty-six Spanish dollars, among which was one identified to be the money of the prosecutor, and a greater number of doubloons than laid in the indictment: it was held that the prosecutor, on application, was entitled to an order for the restitution of the money laid in the indictment.

After conviction, the court will not hear an affidavit of the prisoner's wife, denying any facts on which the verdict was founded.

The prisoner was indicted for grand larceny, in stealing one guinea of the value of $4 75, thirty doubloons of the value of $15 each, and four hundred and forty-four Spanish dollars, the money of James Stanford, on the 5th of September inst.

It appeared, from the testimony of Stanford, that on the 31st of August last he arrived in this city, a passenger from England, in the ship Elizabeth, commanded by captain William S. Sebor. There were about seventy other passengers, and among them was the prisoner. Stanford, when he left that country, had a trunk containing £400 sterling, all of which was in doubloons, except about four hundred Spanish dollars. The gold and silver was put in separate bags, and the trunk was well corded. He had taken out of the trunk on the passage, and after his arrival, £24 8*s*. On Saturday, the 4th of September, he went to the ship in company with the prisoner, and took $10 out of the trunk, and found, as he believed, though he did not count it, the whole of the money there. The trunk, with the goods of Stanford, was put by him on the deck in presence of the prisoner, and Stanford went to get a cart for the purpose of removing his trunk and goods from on board. When he returned, he found that the trunk of the prisoner and his own had been put beneath the decks. They remained there until the Tuesday following, in the morning, when Stanford, in company with the prisoner, came to the ship, for the purpose of taking their baggage to a dwelling, hired by them in Cherry-street. The prisoner went below to pass up the trunks, and shortly cried out, "Here is a trunk uncorded." Stanford, seeing that it was his, told the prisoner to let it alone, for he (Stanford) was robbed. On opening the trunk he found that the bags had been untied, and on examining the remaining money, with George Gray, the mate, found that £199 7*s*. 6*d*. sterling, had been stolen. The trunk with other baggage was from thence carried by Stanford and the prisoner, to their intended residence in Cherry-street. They stopped at a hotel in Courtlandt-street, where Stanford saw the prisoner have a handkerchief containing dollars loose and doubloons wrapped up in a piece of cloth. This money Stanford believed the prisoner took from

his own trunk on board the ship, though he was not positive.

When they arrived at their dwelling, the prisoner expressed much regret that the affair had occurred, and the more so, because his baggage had been with that of Stanford; and therefore voluntarily offered and seemed to insist, that his effects should be searched. He opened the handkerchief, which contained one hundred and forty-seven Spanish dollars, and, as he said, nineteen doubloons. He also showed a steel purse, containing several pieces of the same coin, and declared that the money then shown was all he had. For the purpose of confirming this statement, he also exhibited a memorandum book, containing different sums of gold and silver coin, with the names of persons in London from whom the coin, as he alleged, had been purchased at different times; and the several sums in the book amounted nearly to the sum shown by the prisoner. As he was not suspected by Stanford, a thorough search was not made. He returned to the ship the same day, and conversed with the captain and others, on the subject of his loss, and ascertained that in his absence, between Saturday the 4th and the Tuesday following, the prisoner had been on board the ship, between the decks, and had carried one or more bundles away. Besides, Stanford found that the prisoner's wife had made several purchases of finery, not conformable as was supposed to their circumstances. From these, with other reasons, Stanford determined to make a more scrupulous search, and on the evening of the ninth of September, in company with the captain, the mate, a Mr. Butler, and several others, proceeded to the prisoner's apartment, and found him absent. They staid in the apartment of Stanford until the prisoner arrived, when Stanford proposed to him to have his things searched, which he at first refused, saying, he would not be searched by a mob. However, he shortly consented, and showed the company the same sum, and in the same coin, as he had shown Stanford before, there being $10 less. He then declared this was all the money he had, and repeated it a great number of times. The children were then lying on the bed, and Stanford pretended that he was satisfied, and did not intend to search further; but shortly afterwards said, that he thought it best to make a thorough search. The children were taken up, when Stanford seized hold of the bed, and in turning it over some heavy matter struck the floor.—This being perceived by all present, the prisoner interposed, and stepping up to Stanford said, "D—n you, Sir, you are no man!" The prisoner then took his knife and ripped open the bed, and took out three several parcels of doubloons, in bags, and as he took them out put them into his pocket. In two of the bags, as he said, there were eight doubloons each, and in the other ten, making twenty-six. He did not open the bags, but, to show that it was such coin as he represented, he cut a hole in the side of one of the bags and showed the edges of the doubloons. He was agitated, insomuch that after he had cut open the bags, he ran round and repeatedly inquired of the persons present, "Whose knife is this?" This he continued to do, until he was told the knife was his own. After this he was requested to produce the memorandum book. This was closely inspected, and extracts made therefrom, by one of the company, and the entries were the same as when the book was inspected on the Tuesday preceding. The company then departed.

The same night, at about 12 o'clock, Stanford found the prisoner and his wife counting over a quantity of doubloons, which so increased suspicions, that the next morning Stanford procured a warrant from the police.

It appeared from the testimony of James Hopson, one of the police magistrates, that when the prisoner was brought into the office, he had some gold in his pocket, and was asked whether he had more money. He said he had some dollars. These he brought; and Stanford, being present, was asked whether he could identify any of the money, and he said he could not. After he had been before the grand jury, that body sent for Hopson and inquired, whether among the dollars there was one of a very particular character, which they described. On looking among the dollars Hopson found the one described. This was stamped

on the head side with a small stamp, and on the edge a piece of considerable size, running on the coin in an inclined direction, appeared to have been broken out, as if there had been a flaw in the coin. It bore date in 1812. The silver money found on the prisoner, and the stamped dollar, wrapped up separately, was produced and identified by Stanford, who stated, that he remembered that piece from the circumstance, that when he was purchasing this with other coin, in London, he objected to take this dollar of the jeweller, who assured him it was good. In the course of the trial, in this part of his testimony, Stanford was corroborated by Joseph Sewell, who stated, that he was present when Stanford purchased £400 of Griffin, a jeweller, in London, and that Stanford objected to one of the dollars, but the witness did not see the dollar.

In the course of his cross examination Stanford further stated, that during the passage he was informed by the prisoner, that he was going to see a gentleman in Virginia, to whom he was recommended: that the baggage of the prisoner was detained on board by reason of a difference between him and the captain on account of hospital money, which the prisoner refused paying: that after their arrival, the prisoner and the witness went about the streets together, and he lent the prisoner $2, but is positive he did not pay him the stamped dollar: that he, Stanford, offered a reward of £50 for the lost money; and that by reason of the perturbation arising from the loss, he was unable, when called on by the police magistrate, to identify any of the money; but afterwards recollected the particular dollar. He never told any one on the passage how much money he had, except the mate.

Sarah B. Birch, on being sworn as a witness on behalf of the prosecution, testified, that she came a passenger in the ship Elizabeth. She saw the prisoner on board the ship twice on Monday. The first time he came in company with Patrick Swarthy, and while he remained on deck the prisoner went below, where he staid ten or twelve minutes, during which time the witness saw him leaning over and with his hand on a blue chest belonging to Stanford. The prisoner brought up a small bundle, and went away with Swarthy. The second time the prisoner was on board, the witness does not remember to have seen him below. After it was reported that Stanford had missed the money, the witness heard the prisoner declare, that he had been on board but once on Monday, she mentioned the circumstance concerning his having been on board to the mate, and the prisoner afterwards upbraided her for giving such information.

James Butler, a witness on the same side, corroborated the testimony of Stanford in relation to the search, when the money was found in the bed. When the search was proposed by Stanford to the prisoner, he at first refused, but having consented, he opened the drawer, took out dollars and counted one hundred and thirty-six. He then pulled out a steel purse, containing, as he said, nineteen doubloons. A chest and cupboard were then examined, but nothing was found. After this, the prisoner said, "Will you search the bed?" Whereupon Stanford seemed to make a stop, because the children were in the bed. The witness proposed that it should be searched, when the prisoner took the children off, and Stanford commenced the search by turning over the bed, when something hard struck on the floor. Whereupon the prisoner interposed to prevent Stanford from searching, and spoke the offensive words related in his testimony. The remaining testimony of Butler on this subject corresponded with that of Stanford.

On the passage, the prisoner stated to the witness, that he had deserted from one of his majesty's ships, for which he was sentenced to two months' imprisonment. He deserted the second time, and escaped by taking passage in the Elizabeth.

William S. Sebor, the captain, on being sworn, corroborated the testimony of Stanford in relation to the search on Thursday, and further stated, that the prisoner was on board the ship on Saturday, the 4th of September, for the purpose of taking away his baggage, and had a dispute with the witness, relative to $4 hospital money, which the prisoner refused to pay, and his baggage was de-

tained. On the Monday following he was on board the ship twice, and the second time took from below a small bundle, which was examined by the custom-house officer, and suffered to pass, as linen for the prisoner's family.

It further appeared, from the testimony of this witness, that on Thursday, the ninth of September, he particularly examined the memorandum book, mentioned in the testimony of Stanford, and, on examining the same book on the trial, the witness stated, that there were several fresh entries, and particularly one of twenty-nine doubloons, which he is positive was not in the book on the 9th of September. On this point Stanford, in the progress of his testimony, pointed out a number of fresh entries made in the back of the book, by the prisoner, after the examination on the day last mentioned.

George Gray, the mate, on being sworn as a witness, in part corroborated the testimony of Mrs. Birch, and further stated, that the prisoner on the passage told him that he had deserted twice, as before related. There were workmen removing things between the decks on Monday.

John Woodward, on being sworn, testified, that the prisoner was on board several times on Monday, and took away a small bundle.

Hawkins opened the defence.

Nathaniel T. Proctor, on being sworn on the part of the defendant, testified, that he was from London. In 1799 or 1800 some coin of an uncurrent kind, among which was Spanish dollars, having been brought into England, was stamped for the purpose of affixing the value.—The witness has worked in silver and is acquainted with its nature. Spanish dollars are first cast and then stamped, which makes them hard. He has no doubt, the split on the edge of the dollar before mentioned, which he examined, was occasioned by the additional small stamp, and that two or more dollars of the same description might be obtained of any jeweller in London.

From the testimony of Peter Wood, a witness for the prisoner, it appeared, that on Monday, the 6th of September, the witness went with the prisoner, Stanford and Patrick Swarthy to the house of the Rev. John Stanford, to inquire of him concerning land, which the witness then supposed Stanford, the prosecutor, and the prisoner calculated to buy together, for the purpose of commencing farming. During the passage he had told the witness that his object in coming to America was to buy land and settle it, and proposed to the witness to go on the land with him. The prisoner on the passage had shown the witness the metal purse, containing doubloons, but how many he did not know.

The witness was present during the search on Thursday night. The prisoner insisted on having the bed searched; and when the sound was heard on the floor, the prisoner said, "Search on and you will find more money." But being angry because Stanford had hold of the bed, the prisoner said, "D—n you, Sir, you are no man!"

Edward Wood, on being sworn on the same side, stated, that on the passage the prisoner told him that he had £100 sterling to buy land, and as much more as would set him a going, and proposed to hire the witness and his brother; and the prisoner's wife also said, that if he did not find business he had money sufficient to support them two years.

Patrick Swarthy, on being sworn as a witness on the same side, corroborated the testimony of Peter Wood, with regard to calling on the Rev. John Stanford, and also stated, that the prisoner and prosecutor conversed with several persons about purchasing land. The prisoner and prosecutor continued together until 1 o'clock on Monday, and the company then parted. The witness went with the prisoner in the evening, when he brought the bundle from the ship. He laid the bundle before the custom-house officer for examination, who suffered it to pass.

John Wood, on being sworn as a witness on the same side, stated, that he was present when Stanford made the first search at the house of the prisoner, when the things first arrived, and Stanford said he was perfectly satisfied. The witness was also present at the search on Thursday, and in his relation fully corroborated that of Stanford in the material parts.

The prisoner having rested, William

Sykes was introduced as a witness on behalf of the prosecution, who, on being sworn, said: I am a stranger to the parties. (*Examining the stamped dollar.*) This is not the government stamp, and I do not believe that this stamp ever gave the piece currency in England. After war broke out between England and Spain there was a small stamp, representing the head of the King of England, put on that of the King of Spain, on Spanish dollars; and there was a proclamation issued in England, that such coin so stamped should pass for 5*s.*; but I never saw one of this description before, and I have been much conversant in the currency of the country.

James Butler, on being again called, stated, that he was positive that when the memorandum book was produced, on Thursday, the entry of the twenty-nine doubloons was not made.

Samuel Burn, sworn on behalf of the prosecution, testified, that he is conversant with English currency, and that this was not one of the stamped dollars. Generally they do not break in stamping.

Here the evidence on both sides closed.

Hawkins, in summing up, read to the jury the case of Jennings, from Phillips's "Essay on Presumptive Testimony,"—Phill. Ev. p. 65.

Van Wyck also summed up the case.

The mayor charged the jury: He said that in this, as in most other cases of larceny, it was incumbent on the public prosecutor, in the first place, to establish the commission of the felony, and secondly, that it was committed by the prisoner.

In this case the commission of the felony was fully established: it remained for the jury to determine, from an impartial consideration of all the facts and circumstances afforded by the evidence in the case, whether the prisoner at the bar was the felon.

The evidence was but presumptive; and on this species of testimony, where it is satisfactory, courts and juries may, and in the generality of cases, do rely. For it is a sound rule, that where a larceny has been committed, and the stolen property is found in possession of a man, he shall be presumed the thief unless he satisfactorily accounts for the possession.

The case of Jennings had been produced for the purpose of showing the fallibility of *presumptive proof;* but this case might rather have been cited to show the fallibility of *all human testimony.* For it is observable in that case, that the conviction of Jennings followed in consequence of the perjury of Brunnel, the tavern keeper, rather than on a combination of circumstances; and with such testimony before them, any jury would be obliged to find the prisoner guilty.

The mayor said, he had directed the attention of the jury to this case, not because he thought it parallel to that under consideration, but the rather because should the jury believe that the stamped dollar is the property of Stanford, then, according to the principle upon which the verdict of the jury in the case of Jennings was founded, the prisoner at the bar is to be considered the thief. For the stolen property would be thus traced to his possession, as were the marked guineas in the case read, and he attempts to give no account of such possession.

Therefore, whether this dollar is the property of Stanford is a very important question in this case.

Though Stanford is so far interested that he would be entitled to the money in case of a conviction, still he is a competent witness; and it is but justice to say, that from the manner of giving his testimony, and of this the jury were to judge, he appears entitled to full credit. It appears, that when the dollars were first produced to this witness at the police, he was unable to identify any of them; and an uncertainty on this subject rested on his mind until after he recollected the transaction at the jeweller's; with regard to which, he had been in some measure corroborated by the testimony of Joseph Sewell. With regard to the circumstances attending the identification of this piece before the grand jury by Stanford, he had been corroborated by Hopson: and on this occasion Stanford does not hesitate in saying that this is his money.

The testimony of Proctor was entitled to the consideration of the jury. He had worked in silver, and declares that

stamped dollars of this description were common in England. Directly in opposition to this declaration we have the testimony of two witnesses, one of whom seems to think that such a stamp never entitled dollars to circulate for a given sum. The testimony on this subject was in some measure contradictory; and should the jury believe, that dollars of this stamp were common in England, this would, in some measure, weaken the testimony on this branch of the subject, on the part of the prosecution.

Another circumstance in favour of the identification of this piece of money by Stanford is the mark on its edge. The consideration of this, with the other circumstances, showing that this belonged to Stanford, was highly important: for, unless the jury should believe that this dollar belonged to him, the rest of the testimony is merely circumstantial. But if they should believe that this piece was his, then this resolves itself into the common case of property stolen, and a part, at least, traced to the possession of the prisoner.

The mayor here went into an examination of the circumstances for and against the prisoner.

He offered to be searched, and, what is extraordinary, exhibited the parcel of dollars among which was the one identified. Though there had been some contradictory testimony relative to the search on Thursday evening, yet all the witnesses agree that when the sound was heard on the floor, by turning the bed, the prisoner became agitated; that he took out the money and put it into his pocket, and refused to permit any person to count it, having, before this was found, repeatedly declared that the dollars and the contents of the steel purse was all the money he had.

It must be allowed that it is difficult to account for such conduct on the supposition that he is an honest man.

Though Mrs. Birch had testified that the prisoner was there twice on Monday, in which she is corroborated by the captain and mate, and that he took away the bundle in the morning, yet the presumption that this bundle contained the money is destroyed by the testimony of Swarthy and the custom-house officer.

The trunk must have been broken open between the decks; and it appears there were workmen there engaged on Monday.

The court and jury had been detained with an examination into the circumstances of the prisoner: this was entitled to little weight, and as little should be given to his declarations made on the passage to the witnesses.

With regard to the entries in the book, the mayor said, he should leave them entirely to the consideration of the jury. It was indeed very extraordinary that after the examination of this book, when he must have known that extracts had been made from it, he should have made fresh entries with a fraudulent design.

The whole was a question of fact, on which the court neither had nor would express any opinion, but would leave it entirely to the jury.

The prisoner was found guilty.

Before the day sentence was passed, the counsel on behalf of the prosecution, made an application to the court for a restoration of the money belonging to the prosecutor. The counsel in support of this application, read from the statute (1 R. L. p. 497,) and also read an affidavit of Stanford, stating, that there was stolen from him $750 44: that he verily believed the prisoner stole it, and that on the 12th of September inst. his wife offered to restore the amount, if the deponent would not further proceed, &c.

The court took time to consider; and on the last day of the term, the prisoner having been put to the bar to receive sentence, Hawkins began to read the affidavit of Mary Ball. The court inquired of him the specific object of his application. He said, he intended on that affidavit, in the first place, to move to suspend the sentence, and in the second place, in mitigation.

The mayor informed him, that in regard to the first object of the application, that the court had established a rule that they would in no case suspend a sentence unless it satisfactorily appeared that some mistake in law had been made on the trial; and that unless the affidavit established this, to read it would be useless.

The counsel stated, that he should

then read the affidavit with a view of mitigating the sentence only.

He proceeded to read, that the deponent herself put the three bags of gold in the bed, &c.

The mayor hereupon apprized the counsel, that the court had established a rule with regard to affidavits in mitigation: that they would never regard an affidavit which contradicted any of the facts on which the verdict was founded.

In this case, it would be a manifest perversion of justice to suffer the affidavit of the wife to be read, controverting the facts upon which the verdict was founded. The toleration of this practice would be a great temptation to commit perjury. The court admit affidavits in *mitigation;* not in *contradiction.*

Rodman hereupon renewed the former application, made on behalf of the prosecution, for a restitution, and in support of his argument, cited 5th Jac. Law Dic. tit. *Restitution.* He contended from this, with other authorities, that the courts, instead of awarding a writ of restitution, had in modern times granted an order for that purpose.

The court suggested to the counsel the difficulty which existed in this case: there had been only one piece identified —the verdict was a general one, and afforded no criterion for determining what part of this money, over twenty-five dollars, the prisoner stole. Besides, it is doubtful whether any order could be made by this court, which would be effectual upon the police, where the money is deposited.

The court however made the following order, which was inserted in the minutes.

"The defendant, in this case, having been tried, and convicted in this court, on an indictment, found the 14th day of September instant, for grand larceny; and on motion of Mr. Rodman, of counsel for the said prosecution, it is *ordered,* that the money mentioned in the said indictment, on which the said defendant is convicted, be restored to the said James Stanford, the prosecutor.

Hawkins thereupon gave a written notice to the police, not to pay over this money to the prosecutor.

The court sentenced the prisoner seven years to the state prison.

(CONVICTION—PARDON.)

GILBERT B. HUTCHINS' CASE.

VAN WYCK and DAVID GRAHAM, *Counsel for the prosecution.*
HOFFMAN and WILSON, *Counsel for the prisoner.*

During the month of June, 1806, at the Orange oyer and terminer, N. was convicted of three distinct grand larcenies, on the first of which he was sentenced to the state prison two years, on the second, one year, and on the third, two years. On the 3d of September, 1808, he received a pardon, which recited, a conviction for grand larceny at the same court, in the month of June, 1806, and a sentence *for five years;* and the pardon thereupon released and acquitted him from further imprisonment. It was held that those convictions rendered him incompetent as a witness, notwithstanding such pardon.

Where a witness, on behalf of the prisoner, on trial for the forgery of a promissory note against the witness, declared that such note was in his own handwriting, the court would not, on the suggestion of the district attorney, permit the witness to write a similar instrument and submit it, with that alleged to be a forgery, to the inspection of the jury, though this course was consented to on behalf of the prisoner.

The jury cannot determine whether an instrument is a forgery or not, from mere comparison of handwriting; especially where they have higher evidence.

The prisoner was indicted for the forgery and passing of a promissory note, in these words and figures:

"Sixty days after date, I promise to pay John Neafie, or order, eight hundred dollars, for value received. New-York, Oct. 12th, 1819.

ISRAEL B. HUTCHINS."

After opening the case to the jury, Van Wyck called on John Neafie, as a witness on behalf of the prosecution.

Wilson produced the record of three several convictions of Neafie, at the court of oyer and terminer, holden at Goshen, in Orange county, in June, 1806, before the honourable Daniel D. Tompkins, (then judge,) and others. The first conviction was on the 5th of June, 1806, for grand larceny, in stealing the cattle of Joseph B. Hasbrouck; the second on the 6th of the same month, for the same offence, in stealing a horse, the property of Jacobus Jansen; and the third for the same offence, in stealing the cattle of

Catharine Banks. On the 7th of the same month, he was sentenced on the first conviction to the state prison for two years, on the second for one year, and on the third for two years.

Van Wyck hereupon produced a pardon of Neafie, by his excellency Daniel D. Tompkins, on the 3d of September, 1808. This pardon recited a conviction for grand larceny in the month of June, 1806, at the court before mentioned, and a sentence to the state prison *for five years*, and proceeded to release the prisoner from further imprisonment, in the usual form.

The counsel for the prisoner contended, that the several convictions for grand larceny, which they had produced, or either of them, rendered Neafie infamous, and disqualified him from being a witness, notwithstanding the pardon.—This recited but *one* conviction, whereas the record showed there were *three;* and it by no means followed, that because the sentences on the three several convictions amounted to five years, the time contained in the pardon, the conviction for the grand larceny recited in the pardon, and the several distinct larcenies in the record were the same.

Van Wyck, contra.

The court decided, that the pardon was of no avail, and the witness offered was therefore incompetent. It appeared from the record produced, that there were three several convictions for grand larceny, on each of which the prisoner was sentenced for a term less than five years, and the pardon produced recited a conviction for that offence, and a sentence for that period. Though the several terms on the convictions amount to five years, and the offence was the same, yet, it cannot be justly inferred that the pardon was intended to apply to the whole or either of those convictions: and, for aught that appears, the prisoner may have been convicted of some other grand larceny, at the same court, during the same month; and the pardon may have been granted for that offence. A pardon should recite truly, and with a certainty to a common intent, the conviction to which it is intended to apply.

From the testimony of Peter De Bowne, it appeared, that the prisoner, previous to the 12th of October last, came often to the witness with a note to the same amount as that laid in the indictment, for the purpose of inducing him to endorse it; but this he declined. On that day, the prisoner came with the note alleged to be a forgery, and asked the witness whether he would endorse it if John Neafie would. Knowing him to be good, the witness endorsed the note. The prisoner said, that he had torn up the old one. They both went to Jacob Barker's bank, the note was discounted, and the prisoner received the money.

When the note was nearly due, the witness being uneasy, went to the store kept by the prisoner, and found but few goods, and ascertained by him, that his brother, Israel B. Hutchins, was at Mobile. At the time the note became due, the witness again went to the prisoner to see whether he would pay it, and, in the course of conversation said to him "How did you dare to put your brother's name to the note, and then deny that you were in partnership with him?" To this, the prisoner replied, that the note should be paid, but did not deny the charge of putting his brother's name to the note.

With regard, however, to the truth of this charge, the witness knew nothing except what he had heard from others, nor had he ever seen Israel B. Hutchins write.

John B. Kaim sworn: I have seen Israel B. Hutchins write often. I have looked at this note before; and there seems to me to be a great perplexity in this affair. The *Hutchins* part appears to be in the handwriting of Gilbert B. Hutchins, and the *Israel B.* part to be in that of Israel B. Hutchins. I am well acquainted with both their handwritings, having assisted them in penmanship.—There is a similarity in their handwriting, and their signatures are very near alike. I believe the body of the note is in the handwriting of Israel B. Hutchins. I have conversed with the prisoner on the subject of the note, since this controversy, and he has uniformly denied that he put his brother's name to the note.

John H. Clapp sworn: I have often seen Israel B. Hutchins write, and should not judge this note to be in his handwrit-

ing: it appears to be that of Gilbert B. Hutchins. I bought Israel B. Hutchins out; and had frequent opportunities of seeing him write. I think that the body of the note is in the same handwriting as the signature.

Examined by the mayor. Mr. Clapp, what is your business?

Answer. A cartman: I have driven since May last.

Q. How old are you?

A. Twenty-six years.

Q. What opportunities have you had of forming a judgment of the signatures of individuals?

A. I was a clerk in a store for several years, and afterwards attended to keeping accounts in my own grocery.

Hoffman opened the case on the part of the prisoner. He then introduced Israel B. Hutchins as a witness on the same side, from whose testimony it appeared, in substance, that on the 10th day of October last he wrote and executed the note alleged to be a forgery, and left the city the next day, for the Mobile. The old note was drawn by the witness, on the 7th of the same month, and left with his brother, the prisoner. But, by request of John Neafie, the second note was executed for the purpose of having the time in which the money was to be paid at the bank prolonged. The avails of the note were to go to Neafie, for a balance due him from the witness, on a promissory note for $1460, dated on the 30th of December, 1817, executed by the witness, who owed the money, and the prisoner as his security. The note of $1460 was payable in instalments; and on the 3d of October, 1818, a settlement in full was made between Neafie and the witness, and the balance was struck in favour of the former at $800.

The witness believed, but was not positive, that Neafie was present when the old note was drawn and executed by the witness; but he was positive that Neafie was present and saw the note, on which the indictment is founded, executed.

Van Wyck hereupon requested the witness to write and execute a note similar to that declared by him to be in his own handwriting, for the purpose of enabling the jury to judge whether, in truth, that note was in his handwriting or not. The counsel for the prisoner consented to this course, and the witness was about proceeding to write, when the mayor observed, that the course proposed to be pursued was manifestly wrong, and could not, even by consent, be tolerated by the court. The witness had declared, that the note in question was in his handwriting; and now it is proposed to have him write another, that the jury may judge whether the note, alleged to be a forgery, was executed by the witness or not. Should this be allowed, the jury must necessarily form their judgment by a comparison of handwriting. This never can be allowed, especially in opposition to positive testimony.

Hereupon Van Wyck abandoned the prosecution.

Wilson hereupon moved for a copy of the indictment, for the purpose of commencing a suit for a malicious prosecution. The court took time to consider, and, at a subsequent day in term, granted the motion.

(CONSPIRACY.)

JOHN DUPREY'S CASE.

VAN WYCK, *Counsel for the prosecution.*
GARDENIER and WILSON, *Counsel for the prisoner.*

It is unnecessary, in a prosecution for a conspiracy, to show that any step was taken by the conspirators, or either of them, towards the consummation of the act agreed to be done—it is sufficient, if an *agreement* to do some unlawful or immoral act existed.

Where D. was indicted for conspiring with G. and other persons, to the jurors unknown, and was tried separately, it was held, that it was not necessary for the jury to be satisfied that D. and G. conspired, nor that there should be sufficient testimony to convict any other person of that crime, if on trial; for should the jury believe that D. conspired with any person, whether named in the indictment or not, though there might not be sufficient evidence before them to convict such person, if on trial, they may, nevertheless, convict D.

The prisoner was indicted for conspiring, on the 17th of August last, with Joseph Guion, and divers other persons, to

the jurors unknown, unlawfully, feloniously, and burglariously, to break the house of Cornelius Harsin, and to steal his goods.

It appeared, from the testimony of John Freacke, a Frenchman, that he was the hired servant of Harsin, living on the Bloomingdale road, near the five mile stone; and that one Sunday, while the witness was in or near the barn, a strange man, but not the prisoner, brought the witness a letter, and said——

Wilson objected to what was said by that man, but the court overruled the objection, stating, that in this species of offences, especially where the party was charged with conspiring with persons unknown, the declarations of third persons were admissible.

The witness proceeded to state, that the stranger said, the letter came from a friend in town; and the witness then went with the strange man into the store of Chaneau, which was near, and attempted to read the letter, but could not, when the stranger told him there was no use in reading it, for his friend who wrote it was close by. Shortly afterwards, at the door of Samuel Rouschet, the witness met the prisoner. The witness inquired of him whether he wrote the letter, to which he replied that he did not, it was written by one Charles in town, a friend, and an acquaintance of the witness. He told the prisoner, that he did not know Charles; and again undertook to read the letter, when the prisoner snatched it out of his hands, and tore it up, asserting that there was no necessity for reading it, as he was acquainted with Charles.

After some further conversation, the prisoner said to the witness, "You are here a gardener; you work hard and cannot get along: suppose you join us to rob the old lady, (meaning Mrs. Harsin,) she has plenty of cash. There are three that are joined together, and you will make a fourth." To this the witness replied, "Unfortunate man! What is it that you would undertake? You will be resisted by Mr. Harsin—you will be taken." The prisoner then said, that he had followed the business for seven years, and that he would put a pistol to the old gentleman's mouth, and he would surrender and show where the money was, and the old lady would make no resistance. The prisoner said, he had been acquainted with the house six or seven years, and knew a back room, in which there was a large sum of money. The witness refused to consent, and the prisoner then went to the other and said, "There is nothing to be done."

After this interview the witness was uneasy, immediately disclosed it to his wife and friends, and in three days told Mr. Harsin the whole.

By the mayor. Was the strange man, who brought the letter, present at this conversation?

Answer. Not in hearing: the prisoner and myself talked together at the fence, leaving the strange man at Rouschet's; and when we returned, we found him there.

Samuel Rouschet, a witness for the prosecution, testified, that on Sunday morning, about four weeks ago, the prisoner with his friend Joseph Guion, with whom the witness had been a soldier, came to his house, near that of Harsin, and inquired for John (meaning Freacke.) The witness showed them Harsin's house, and the prisoner then asked the witness, whether he had a boy to send a letter by to John. The boy not being at home, and the witness not being able to find one, Guion proposed a walk, and while near Harsin's house, the prisoner asked the witness a number of particular questions touching the security of Harsin's outhouses. Guion staid behind to look for John, and remained absent about half an hour.

Jacob Harsin, on being sworn, corroborated the testimony of Freacke concerning the disclosure, and further stated, that there was a considerable sum of money in one of the back rooms, as Freacke related had been told him by the prisoner.

The witness offered Freacke $10 to take the conspirators, or either; and by pretending to accede to their views, he succeeded in having the prisoner arrested. The others escaped.

The prosecution having rested, Wilson submitted to the court, whether there was sufficient evidence to put the prisoner on his defence. The conspiracy

was inchoate ; and it appears by the testimony on behalf of the prosecution, that the plan was abandoned. The counsel cited the case of Manetti, *et al.* (3d vol. City-Hall Recorder, p. 60,) and also read from the 1st vol. Starkie's Crim. Plead. p. 145, to show, that "It is at all events proper to allege one or more overt acts done in prosecution of the confederacy on which the indictment is founded."

The mayor said, that the case ought to go to the jury : for if they believed the testimony, he did not hesitate to say, that this was as clear a case of conspiracy as ever was prosecuted. His reasons for that suggestion he should submit in his charge to the jury.

Wilson and Gardenier summed up the case to the jury on behalf of the prisoner. The latter counsel argued, that as a conspiracy was an agreement between two or more to do some unlawful act, the *agreement* should be clearly proved. According to the evidence in this case, there was but a mere attempt, on the part of the prisoner, to induce Freacke to make an agreement, and if any agreement could be inferred from the facts, it must have been between Guion and the prisoner, to get John to conspire. But as he did not accede to the proposition, no conspiracy existed.

To constitute this offence two or more persons must conspire ; and where, as in this case, the prisoner is tried separately, the jury never can convict, unless there should be sufficient evidence to convict the co-conspirator, were he on trial. But from the facts in this case the jury would not be warranted in convicting Guion, and therefore the prisoner ought not to be convicted.

Van Wyck also addressed the jury on behalf of the prosecution.

The mayor, in his charge to the jury, commenced by saying, that cases of this description were highly important in the administration of justice, inasmuch as it was more desirable to punish offences in their inception, and to prevent their commission, than to wait until they were perpetrated.

Although the crime under consideration, involves or supposes an *agreement*, yet that term, generally used in an indictment, is mere surplusage ; for a conspiracy may exist where the parties have *assented* together to do some unlawful act.

The allegation in this indictment is, that the prisoner conspired with Joseph Guion, and other persons, to the jurors unknown, to break open and rob the house of Harsin ; and before the prisoner can be convicted, the jury should be satisfied that this was the intent of the conspirators.

It is also necessary for the jury to be satisfied that two or more conspired, for if the prisoner stood alone, and merely meditated the accomplishment of the act, he would not be criminally responsible.

One of the counsel for the prisoner had contended to the court and jury, that as the prisoner took no step to consummate his intent, the crime was not completed, and the prosecution therefore was not supported. Whatever might have been the doctrine on this subject formerly, no law is now better settled than that if a man proceeds so far as to agree with, or give his assent to, another, to do an act unlawful—if he combine or confederate with others, though no step is taken towards the commission of the offence, the conspiracy is complete.—Shall it be said, that a conspiracy between two or more to burn a house, is incomplete before the match is applied? Then indeed would the law, which is, and ought to be as prompt and efficacious in preventing as in punishing crime, be miserably defective. No : the moment the individual conspires, he has committed the offence, and is amenable to punishment for his *wicked design*.

It is unnecessary for the jury to find that the prisoner conspired with Guion : it is sufficient for the purposes of this prosecution, if the prisoner conspired with any person or persons whatsoever ; even though there might not be sufficient evidence before the jury to warrant a conviction against any other, except the prisoner. For suppose he should make an ample confession, this would not be sufficient, nor would it be received, to criminate the others. And yet such confession would be evidence against the prisoner, and he might be convicted ; and the jury, believing that others must have conspired with him, but, for want

of competent testimony, would be bound to acquit them.

The mayor said further, that as the facts were solely within the province of the jury, he should not undertake to detail them. He had said, that if the jury believed the testimony, this was as clear a case of conspiracy as ever occurred. He should, after noticing the principal objections, which had been made to the testimony of Freacke, explain to the jury the grounds of that opinion.

The mayor here proceeded to notice those objections, and instructed the jury, that Freacke was a competent witness, that he had not been impeached, and the credit to be attached to his testimony, his honour should leave with the jury. It had been said, by the counsel, that in a case of this kind it was an awful thing to convict a man on the testimony of one alone. But it is to be recollected that Heaven has provided us with no other means.—We are sworn to judge according to the evidence; and in crimes of the highest grade, the jury may convict on the unsupported testimony of an individual who is a competent witness and not impeached.

The remaining remarks to be submitted to the jury, were to be made on the supposition that Freacke was to be believed.

The objects of inquiry naturally arising in this case, were two:

First. Did the prisoner conspire with Guion?

Second. (Should this be found in the negative,) Did the prisoner conspire with others unknown?

The mayor here adverted to the prominent circumstances of the case, and observed, that there was a communication between the prisoner and Guion relative to one Charles. And if this was an innocent communication, *why are not those men here present to explain its nature?* And from their absence will not the jury be justified to draw a strong inference against the prisoner? Again, what inference can the jury rationally draw from the parting observation made by the prisoner to Guion, "There is nothing to be done?" Can this be reconciled with their innocence?

But should the jury not be satisfied, that the conspiracy was between Guion and the prisoner, then the remaining question would be, whether he conspired with *others unknown*. To determine this in the affirmative, it does appear to the court, that we need only recur to the words of the prisoner to the principal witness: "I propose that you join us to rob the old woman. *There are three joined, and you will make the fourth.*" It was this which induced the suggestion in an early stage of the cause, that if the jury believed the testimony, this was a clear case of a conspiracy.

Is there any room then for the assertion, that the offence is but inchoate? It is true that the argument would hold if the prisoner was now on his trial for the *robbery;* but he is charged with a conspiracy to rob; and if we refer to the testimony, it will be found that the agreement to rob existed before any communication was made to Freacke, for the purpose of inducing him to become an instrument to accomplish the wicked design.

The prisoner was convicted and sentenced to the penitentiary three years.

*** *In consequence of the extreme heat in the latter part of the summer, and the recent calamity which has threatened this city, Bridewell cases only were tried in the sessions, during the terms of August, September and October. The editor hopes that this consideration will furnish an apology to his patrons for the omission of the number for August, and the suspension of the publication until this time; while he assures them, that the usual number of pages in this volume will be issued, replete with the most useful and interesting cases.*